



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 9, 2019

By email (HCheung@perini.com) and first class mail

Cherry Hill Construction, Inc.
8211 Washington Boulevard
Jessup, MD 20794

Attention: Henry Cheung, Sr. Vice President

**Re: York County
S.R. 0083-040
ECMS 62880**

Gentlemen:

This letter is written in response to yours of May 3, 2019, to Mr. Keiser and Mr. Schlachter. Because this matter has escalated to a point at which Cherry Hill Construction (CHC) has filed a formal claim with PennDOT's contracting officer it is now primarily a legal matter, so Mr. Keiser asked me to respond to your letter on PennDOT's behalf. Note that I am copying Mr. Bowman as a professional courtesy because he appears to be the attorney representing CHC in this matter. As an initial matter, please be advised that PennDOT reserves all rights and does not agree with any statements made in your letter unless such agreement is explicitly stated hereinafter.

CHC contends that the contract time should be extended by hundreds of days – the current demand is over 500 days – because of certain events that occurred fairly early in the project. CHC also contends that this time extension should be fully compensable. The current demand is somewhere in the \$20 million range, and CHC's demand has at all times been well in excess of \$10 million.

PennDOT disputes CHC's claimed entitlement to any time extension or delay compensation. It is PennDOT's position that any delays experienced on the project (other than any for which PennDOT has previously granted time extensions) are attributable to acts, events, matters, causes or things for which, as between CHC and PennDOT, CHC is fully responsible. Even if one were to make the assumption that PennDOT is responsible for project delay to the full extent maintained by CHC – an assumption that, PennDOT believes, is unsupported by the facts – the amount of delay compensation sought by CHC is grossly excessive.

A sharp dispute therefore exists between the parties. Despite its view of the merits of the positions being maintained by CHC, PennDOT, at CHC's request, has met with CHC (and/or Tutor Perini) representatives and discussed various scenarios as possible means of

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compromising the parties' dispute. It would have been irresponsible of PennDOT not to have done so. At no time during these discussions did PennDOT – or CHC, for that matter – make any admissions or concessions with respect to the issues in dispute. I have to believe that you understand this, notwithstanding some of the statements made in your letter of May 3, 2019.

As discussions continued, the contract completion date of November 12, 2018 – which had already been extended because of matters that are not involved in the ongoing dispute – came and went. The parties have agreed in the contract that CHC is liable for certain liquidated damages for failure to complete the project on time, as well as for other reasons. PennDOT may withhold liquidated damages due from current contractual estimate payments. CHC requested that PennDOT forbear from withholding liquidated damages due from current estimate payments because of the pendency of negotiations. As a courtesy, PennDOT, while reserving all rights, agreed.

Given the extremely aggressive positions CHC staked out for itself from the beginning, an agreement to resolve the ongoing dispute appears, in retrospect, never to have been very likely. Still, as noted above, it would have been irresponsible for PennDOT not to have met and discussed matters as requested by CHC. Eventually, it became clear that additional discussions presented essentially no likelihood of a result that either party was willing to accept. Accordingly, CHC proceeded to present PennDOT with a more formal claim to the contracting officer, a step which, under the specifications and the Commonwealth Procurement Code, is the final prerequisite to the initiation of litigation before the Pennsylvania Board of Claims. PennDOT – as it reserved the right to do from the time the issue first came up – advised CHC that it intended to withhold from current estimate payments contractual liquidated damages that had accrued since the project completion date and continue to accrue.

CHC has presented a delay claim that is out of proportion to anything to which it might reasonably claim entitlement. It professed to want to negotiate but appears to have yielded little, if anything, in the negotiations that ensued. CHC now takes the position that PennDOT gave away major parts of its position by the very fact of its participation in the negotiations, and that it is "bad faith" for PennDOT to conclude (because the parties are miles apart) that the negotiations will not produce a mutually acceptable result and insist upon full enforcement of its contractual rights. Meanwhile, years after the events that are the subject of its pending claim, and six months after the project completion date, CHC devotes minimal resources to prosecuting the work and continues to allow the project schedule to slip. Your letter seems to

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indicate that CHC is, perhaps among other things, concerned – even preoccupied – with characterizing PennDOT's motives. PennDOT, for its part, is completely uninterested in impugning CHC's motives in relation to the ongoing dispute and committed to a full and fair resolution of the dispute on its merits. I hasten to add that PennDOT is even more committed to progressing toward project completion without any further undue delay, and it expects nothing less from its contractor going forward.

Sincerely,



Jeffrey W. Davis
Deputy Chief Counsel
Highway Construction & Claims Division

cc: Michael C. Keiser, P.E., Dist. Exec., Eng. Dist. 8-0 (email)
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